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Date: March 8, 2001

Case No: 2000-LHC-01632

OWCP No.: 6-177681

In the Matter of:

SUSAN RUSSELL,
Claimant

v.

ATLANTIC DRY DOCK, INCORPORATED
Employer,

and

ARM INSURANCE SERVICES,
Carrier

Appearances:

Christopher P. Boyd, Esq.
For Claimant

James F. Moseley, Jr., Esq.
Carolyn H. Blue, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 et seq. Claimant, Susan Russell, seeks permanent total disability (PTD) benefits from April 1, 2000 through the present and continuing because, she argues, Atlantic Dry Dock, Inc. and Carrier Arm Insurance Services, Inc. ("Employer") have failed to identify suitable alternative employment for her. Alternatively, she seeks PTD benefits from May 1, 2000 through the present and continuing because Employer has failed to prove the availability of suitable alternative employment in Claimant's community. In the second alternative, Claimant seeks temporary total disability (TTD) benefits from January 1, 2000 through the present and continuing due to the fact that she has been enrolled in a Department-of-Labor (DOL)-approved rehabilitation program since January 1, 2000. Claimant also argues that Employer has calculated her Average Weekly Wage (AWW) improperly and that she is entitled to payment of back benefits in accordance with the proper calculation of her AWW. In addition, Claimant asserts entitlement to continued medical care for her shoulder, back, and neck conditions. Finally, Claimant seeks penalties and interest for benefits that Employer has not paid on time or has not paid at all. Also, Claimant's counsel asserts that attorney's fees are due and owing in this matter.

Employer takes the position that Claimant is not currently suffering from any permanent injury, that Claimant did not suffer back and neck injuries in the July 22, 1998 incident that injured her shoulder, that she did not raise the possibility of a neck and back injury until less than thirty days prior to the hearing in this matter, and that the AWW has been properly calculated and benefits properly paid.

A formal hearing in this case was held on September 25, 2000 in Jacksonville, Florida. All parties were afforded a full opportunity to present evidence and argument as provided for by statute and regulation. At the hearing, Claimant offered exhibits CX 1 through CX 11, and Employer offered exhibits EX 1 through EX 16.[1] Depositions conducted by Claimant and Employer were received into evidence, subject to post-hearing receipt, as CX 12 and EX 17 through EX 19 (Tr. 121).[2] All were or are admitted into evidence. Both parties submitted post-hearing briefs. The findings and conclusions that follow are based on a complete review

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[1] The following are references to the record:
EX- Employer's exhibits
CX - Claimant's exhibits
Tr. - Transcript of hearing

[2] In fact, Claimant did not take any post-hearing depositions. Dr. Longenecker's deposition was incorporated into CX 10. The remaining depositions are numbered as follows:
CX 11 - John P. McGregor
EX 17 - Dr. Stephen Lucie
EX 18 - Dr. Robert Franco
EX 19 - Jerry Albert

of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant have stipulated to and I find the following:

1. The parties are subject to the act.

2. Employer and Claimant were at all relevant times in an employer/employee relationship.

3. On July 22, 1998, Claimant suffered a right shoulder injury which arose out of and in the course of her employment with Atlantic Dry Dock (ADD).

4. Employer had timely notice of the injury to Claimant's right shoulder.

5. The report of accident, Claimant's claim, and Employer's notice of controversion were all filed in a timely manner.

6. Claimant reached maximum medical improvement (MMI) for her back injury on April 1, 2000.

(Tr. 6-12).

ISSUES

1. What are the nature and extent of Claimant's shoulder, neck, and back injuries?

2. Is Claimant disabled within the meaning of the act?

3. Has Employer shown the availability of suitable alternative employment from April 1, 2000 to May 7, 2000?

4. Has Employer shown the availability of suitable alternative employment after May 8, 2000?

5. What is the correct calculation of Claimant's AWW?

FINDINGS OF FACT

Testimony of Susan Russell

Claimant moved from Fernandina Beach, Florida, near Jacksonville, to Arden, North Carolina in the first week of May 2000[3] (Tr. 38). Claimant moved so that her mother could help support Claimant and her two children (Tr. 38-40). While living in Fernandina Beach, Claimant received benefits from Employer (Tr. 40). She also worked at a convenience store, making just about minimum wage, and worked at Gator City taxi "later on" (Tr. 40). The exact dates that she held these jobs are unclear from the record.

Claimant dropped out of high school in tenth grade and later obtained her GED (Tr. 42-3). Since obtaining her GED, she has taken one welding course and one computer class (Tr. 43). After leaving high school, she worked as a babysitter, fast-food employee, extruder technician, and in various other odd jobs (Tr. 44-5). In 1993, Claimant became a welder, and in May 1997, she went to work at ADD (Tr. 49). Her job, as it existed in July 1998, required her to lift 50 to 100 pound items and to climb straight up and down ladders. She also performed significant amount of overhead work, repetitive bending, and crawling (Tr. 51-5).[4]

Claimant first sustained an injury at ADD in the summer of 1997 (Tr. 58). She injured her back, neck, hips, legs and arms when she was almost jerked off the side of a barge while attempting to pull up leads (Tr. 58). She worked on light duty for a time, but she had returned to full duty before July 1998 (Tr. 60).

While working at ADD on July 22, 1998, Claimant was carrying her heavy welding equipment down some stairs when she slipped on some "slag," which caused her to stumble and "almost" fall (Tr. 62). As this happened, she felt a shock of pain through her whole body (Tr. 62-3). The days prior to the accident had involved unusually hard work, requiring more moving around and more lifting than usual (Tr. 63).

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[3] According to the uncontradicted records of John McGregor, Claimant's official date of residency in North Carolina was May 8, 2000 (CX 2, p.14).

[4] Claimant submitted a job description issued on Atlantic Marine, Inc. letterhead which indicates that "Physical Requirements for Shipfitters, Pipefitters, Welders [etc.]" include being "able to lift 50-75 pounds on a consistent, daily basis," "able to bend, stoop, [and] climb aboard ships," and "able to utilize both hands to grasp rails while climbing, to hold and carry tools and equipment, to operate tools and machinery" (CX 10, p.138).

Claimant went to the clinic on ADD premises on the day of the accident, where they put limitations on her and told her that she needed to go into rehabilitation. Sometime after her accident, Employer provided light-duty opportunities to Claimant (Tr. 66). She continued performing all of the light duty tasks that Employer assigned to her until Terri Garrett, Employer's nurse, sent her home, a decision made entirely by Employer (Tr. 68). Shortly after Employer sent Claimant home, TTD benefits commenced. Employer has not contacted Claimant regarding the availability of work of any type since she was sent home (Tr. 68).

After the accident, Claimant began to feel pain in her right shoulder (Tr. 64). Within a month of the accident, after the shoulder stopped hurting so much, she felt pain in her back (Tr. 64). Nothing occurred during this period that could explain her back problems except the days of hard work and the July 22 incident (Tr. 64). The back pain that she felt after the July 22 accident was different from the pain she experienced after her 1997 injury (Tr. 64). The previous pain had gone away altogether, and the new pain was in a different location (Tr. 65).

Claimant discussed her treatment by Dr. Lucie (Tr. 69-70), Dr. Scharf (Tr. 71, 101-2), Dr. Longenecker (Tr. 72-5), Dr. Rogozinski (Tr. 75-8), and Dr. Franco (Tr. 78-80). She testified that Dr. Longenecker told her that surgery might not fix the problem and might make it worse. She chose not to have surgery based on Dr. Longenecker's statements and on a previous bad experience when her pancreas was nicked during a gall bladder operation (Tr. 74). She only saw Dr. Franco once, for a total of five to seven minutes (Tr. 80). He did not ask about the accident or how she was injured but asked why she did not want surgery. She asked him about her back, and he said he was only there to examine her shoulder (Tr. 79-80).

In January 2000, Claimant entered a DOL-approved retraining program in biomedical engineering technology at Florida Community College of Jacksonville (FCCJ) (Tr. 80-1). She took classes in basic math, English, psychology, and human anatomy (Tr. 82). This was a full course load, and she made three As and one B (Tr. 83). She testified that she "did a little bit of studying" for the psychology and anatomy classes but that the other two courses were "basically common knowledge and common sense" (Tr. 83). She must maintain a certain GPA to remain in the DOL program, but she does not remember whether it is a 3.3, a 3.0, or something else (Tr. 83).

She did not take classes over the summer because she was moving to North Carolina (Tr. 84). She currently lives in Arden, North Carolina and attends Asheville-Buncombe Technical Community College (AB Tech), which is twenty miles from her home (Tr. 84-5). She is taking thirteen hours of classes, which are more difficult than the "mostly remedial" classes she took in Jacksonville (Tr. 87). She currently studies three hours at home for every hour in class, and she does not believe that she would be able to hold a part-time job and maintain her grades in school (Tr. 86-7).

Between March and September 2000, Claimant saw no doctors except during her single visit with Dr. Franco (Tr. 103). She stated that she did not go to the doctor because she had been told there was nothing to be done except surgery, which she did not want (Tr. 113).

Since moving to North Carolina, Claimant has investigated some job opportunities but has not applied for any jobs because none of the jobs was within her restrictions (Tr. 104, 111). She stated that many different doctors had given her different restrictions at different times, and she could not remember which doctor imposed which restrictions (Tr. 112-3).

Deposition of John P. McGregor (CX 11)

McGregor is a self-employed vocational rehabilitation counselor (CX 11, p.4). DOL hired McGregor to work with Claimant when she relocated to North Carolina (CX 11, p.7). Claimant is enrolled in a training program in biomedical equipment technology, which McGregor believes she will be able to complete within five semesters (CX 11, p.10). He estimates that she will be able to find a job starting at $27,000 to $33,000 when she completes the program (CX 11, pp.12-3). McGregor advised Claimant against working part time while in school (CX 11, p.14). DOL is paying for Claimant's tuition and books while she is in the training program (CX 11, p.15). Claimant plans to transfer to Caldwell Community College, approximately seventy-five miles from her home, in August 2001, in order to complete her program (CX 11, pp.20-1). McGregor does not think it likely that Claimant could finish her courses in less than five semesters because she needs to take a number of remedial classes (CX 11, pp.23-4).

Records and Deposition of Dr. Stephen Lucie (EX 2, EX 7, EX 8, EX 17; CX 10, pp. 140 -143)

Dr. Knibbs, the company doctor for ADD, saw Claimant soon after the accident and placed her on light duty. He ordered an MRI of her right shoulder, which was completed on August 5, 1998 (CX 10, p.131). Dr. Edward Franco, a radiologist, read the MRI to reveal evidence of mild to moderate compression upon the supraspinatus muscle which could be causing an impingement syndrome (CX 10, p.131). Additionally, Dr. Franco noted moderate tendonopathy in the tendon of the supraspinatus muscle (CX 10, p.131).

Dr. Knibbs referred Claimant to Dr. Stephen Lucie, an orthopedic surgeon (EX 17, p.6). Dr. Lucie first saw Claimant on August 24, 1998, at which time she complained of "quite a bit of discomfort" since overexerting her shoulder on July 22, 1998 (EX 17, p.6). Dr. Knibbs had placed Claimant on 800 milligrams of Motrin four times per day, which Dr. Lucie characterized as a "large dose" (CX 10, p.140; EX 17, p.6). Dr. Lucie performed an

examination on Claimant, who had "very positive impingement[5] findings" (EX 17, p.7). He diagnosed her as having a right shoulder impingement and injected her right shoulder with Celestone, a steroid, and Marcaine, a numbing medicine. The injections alleviated about half but not all of her pain (EX 17, p.7).

Dr. Lucie returned Claimant to work at modified duty with limited use of the right arm. Dr. Knibbs had already placed her on light duty and restricted her against lifting more than twenty pounds and against frequent lifting or carrying of more than ten pounds (EX 17, p.9; CX 10, p.141). On August 25, 1998, Dr. Lucie referred Claimant for physical therapy for her right shoulder condition (CX 10, p.141).

Dr. Lucie next saw Claimant on September 11, 1998 (EX 17, p.9; CX 10, p.142). Claimant stated that the injection she had received on her previous visit had not given her any relief. Although the response to such injections is "highly variable," Dr. Lucie was surprised by her response because she had told him on the previous visit that it gave her "about 50 percent relief" (EX 17, p.10; CX 10, pp.140-1). Dr. Lucie noted some inconsistencies with the previous exam. Her previous exam had been "fairly consistent with. . .subacromial impingement," but in the second exam,

> she was more hurting all over. And when we checked her strength some of the tests which were normal before now she just couldn't use and let her arm drop and really didn't seem to be trying too hard to hold it up against resistance.

(EX 17, p.12).

Dr. Lucie explained that there are "a variety of reasons" for patients to have inconsistent exams. He stated:

> [S]ometimes it's because they're hurting more that particular day. Sometimes they're hurting less. Sometimes the exam is inconsistent if they don't have real disease and they're trying to fake an injury.

(EX 17, p.12).

Following the September 11 exam, Dr. Lucie called Claimant's physical therapists and asked them to "look critically at the inconsistencies in her exam" (CX 10, p.142). Dr. Lucie also requested that musculoskeletal radiologist Joe Utz review the right shoulder MRI to find if there was a "real disease" (EX 17, p.11; CX 10, p.142). Dr. Utz did not detect a rotator cuff

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[5] Dr. Lucie testified that "impingement" occurs "in certain shoulder conditions, as you raise your arm up, you pinch the rotator cuff on the top bone, which is the acromion" (EX 17, 7).

tear, but he did see the tendon changes that Dr. Edward Franco had previously observed (EX 17, p.11; CX 10, p.131). Dr. Lucie did not impose any additional restrictions as a result of the September 11 exam, and he allowed Claimant to continue working at modified duty (EX 17, p.13).

Dr. Lucie next saw Claimant on September 30, 1998 (EX 17, p.13). She reported that therapy was helping but work was aggravating her symptoms, a statement with which the therapists "seem[ed] to agree" (CX 10, p.142). Dr. Lucie determined that Claimant was "doing too much work at this time" and that "[s]he needs to be off for two weeks or be very restricted" (CX 10, pp.142 -3).

Dr. Lucie examined Claimant for the last time on October 16, 1998 (EX 17, p.13). She complained of neck pain and numbness and pain radiating into her right hand (EX 17, p.14). These are not complaints that patients who have shoulder impingement frequently make (EX 17, p.14). Dr. Lucie examined her shoulder and found that she had a good range of motion (EX 17, p.14). Her impingement findings were relatively negative, indicating that she was recovering or the pain was changing (EX 17, p.14). Her cervical (neck) X-rays, taken on October 16, were normal (EX 17. pp. 14 -15). Dr. Lucie spoke with Claimant's trainer at HealthSouth, who stated that he had found "very inconsistent" and "subjective" pain complaints that were limiting her exercises (EX 17, p.15). Dr. Lucie's notes from the examination indicate that he was "at a loss to find the organic site of her problem." (EX 2). He further noted that:

> I think she has a soft tissue strain in her shoulder and has had chronic subjective pain complaints. I can find no objective disease to which I can base the orthopedic treatment . . . I do not find any permanent impairment on which an objective basis can be obtained.

(EX 2). In his deposition, Dr. Lucie further explained that he had been unable to pinpoint Claimant's problem due to "the migratory nature of her pain and the change in her complaints" (EX 17, p. 15). He believed that he had nothing further to offer her in the way of orthopedic care, and he referred her back to Dr. Knibbs (EX 17, p. 16).

Dr. Lucie reviewed Dr. Longenecker's records and characterized the difference between his diagnosis and that of Dr. Longenecker as "a difference of opinion on the treatment of the patient, which is certainly reasonable for the varied complaints that she gave" (EX 17, p.18).

Dr. Lucie reviewed the functional capacity evaluation (FCE) that was performed on June 9, 1999 (CX 3, pp. 9-13; EX 17, p.19). He stated that the history given on the FCE was inconsistent with the history that either he or Dr. Longenecker's reports indicated (EX 17, p.19). The physical examination included in the FCE, showing pain from the inferior border

of the scapula to just above the spinous scapula, was also inconsistent with any previous examination conducted by Dr. Lucie or by Dr. Longenecker (EX 17, p.19). However, Dr. Lucie did not dispute that the results of the FCE indicate that Claimant needed to be in a light-work category (EX 17, p.19-20).

Dr. Lucie customarily uses FCEs in the normal course of his practice as an orthopedic surgeon (EX 17, p.20). An FCE helps to delineate the specifics of what kind of work an individual can and cannot do, but the test is based largely on the subjective abilities of the patient along with some objective data (EX 17, p.20). Based on the results of the June 9 FCE, Claimant would not be able to perform duties as a welder (EX 17, p.22).

Dr. Lucie also reviewed an FCE conducted on March 29, 2000 (EX 17, p.23). He agreed that this FCE, which placed Claimant in a "light-duty" category, would be inconsistent with her going to work as a welder (EX 17, p.24). However, he noted that the FCE indicated a very limited range of motion in the shoulder, which was not documented in previous examinations conducted by Dr. Lucie or by Dr. Longenecker (EX 17, p.24).

Dr. Lucie is "very" familiar with Biodex testing, which he uses in the normal course of his practice in orthopedic surgery and which is commonly used throughout the orthopedic community (EX 17, p.26). He explained the functioning of the Biodex machine:

> Biodex is an isokinetic, which is a continuous resistance type of exercise in testing, which the patient is strapped to a machine and gives them maximum effort. And then the machine, through a computerized program, can quantitate the amount of weakness in one side versus the other side

(EX 17, p.26). Dr. Lucie examined the results of a Biodex of Claimant, which was ordered by Dr. Longenecker (EX 17, pp.26-7). According to Dr. Lucie's interpretation, the Biodex showed "mild weakness of this affected [right] shoulder as compared to the other shoulder" (EX 17, p. 27). This could indicate several things: Claimant might have a "pure weakness" in her right shoulder; she could have a shoulder weakness due to her neck complaints "which popped up somewhere along the course of this treatment"; the weakness could be a result of the impingement findings; or the weakness could result from the fact that she had favored her shoulder for so long that it got weak from not being used (EX 17, p. 28).

The Biodex is sometimes able to detect the patient's attempt to fake a weakness. The Biodex in this case seems to be valid, but Dr. Lucie does not consider himself an expert on shoulder Biodexes (EX 17, p. 28). He does not know whether the Biodex is relied on by orthopedists in general. He uses it frequently, although on the knee more often than the shoulder (EX 17, p.31). None of the measures of capacity discussed during the deposition, including Biodex, is definitive (EX 17, p. 31).

Records and Deposition of Dr. Stanton Longenecker (CX 3, CX 10).

Employer referred Claimant to Dr. Longenecker, an orthopedic surgeon, for a second opinion (CX 10, p.49). Later, in Dr. Longenecker's words, Employer "begged" him to take over as her treating physician (CX 10, p.49). When Dr. Longenecker first examined

Claimant on November 2, 1998, she primarily complained of pain when using the right shoulder and right upper extremity (CX 10, p. 7).

Dr. Longenecker stated that Claimant's shoulder MRI and Dr. Edward Franco's report indicated mild degenerative changes in the AC joint, causing mild to moderate compression of the supraspinatus muscle. In laymen's terms, Dr. Longenecker testified, a spur from the AC joint was pushing down into the muscle and creating "the equivalent of a stone in the shoe type environment." Explaining this analogy, he stated that, "If you have a stone in your shoe, you walk on it, you will discover pain. If you're not walking on it, of course, you will not feel any pain" (CX 10, pp. 9-10).

In Dr. Longenecker's opinion, then, Claimant would only feel pain in her shoulder when she moved the joint (CX 10, p. 10). He stated that the irregularities on the MRI were "real" and that it was highly unlikely that they could have been fabricated by the patient (CX 10, p. 11). The MRI also indicated a mild effusion - an abnormal accumulation of fluid - in the shoulder joint. This could be caused by joint fluid or blood, and it could indicate an acute or a chronic injury. The presence of an effusion is an objective abnormality finding (CX 10, p. 15)

Dr. Longenecker's own examination indicated global shoulder tenderness (CX 10, p. 11). The shoulder was sore wherever he touched, but forward and lateral elevation aggravated the pain (CX 10, p. 11). He also felt her shoulder pop at the ninety degree point of rotation, which indicated rotator cuff disease (CX 10, p. 11-2).

Dr. Longenecker could not pinpoint a source of pain during the examination. Claimant was very apprehensive, and anywhere he touched elicited pain (CX 10, p.13). Her examination showed giveway weakness[6] in the deltoid, supraspinatus, and biceps (CX 10, p. 13). Claimant did not have a sharp giveway, but a very smooth loss of strength. Giveway weakness may indicate that the patient is "not trying too hard on that particular exam." It may also indicate that the patient is apprehensive. The pop in the rotation indicated an objective problem, but, based on the rest of the examination, Dr. Longenecker was not yet sure that he was dealing with a legitimate complaint (CX 10, p. 14). He ordered a Biodex test in order to determine whether her complaints were legitimate (CX 10, p. 16). The Biodex results were

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[6] Giveway weakness occurs when the muscle breaks before the examiner perceives pain (CX 10, p.13).

consistent enough to persuade him that "this girl was real" (CX 10, p.19).

Difficulty with overhead activities is consistent with the problems that Claimant manifested, as the involved muscles are at a maximum usage when working overhead (CX 10, p.19). The shoulder is a very unstable joint, and the rotator cuff holds it together (CX 10, p.20). The rotator cuff can tolerate overhead movement for short periods of time but not for long periods (CX 10, p.21).

A therapist who examined Claimant on November 19, 1998, found a positive impingement sign (CX 3, pp.17-9,CX 10, p.22). The therapist also noted that Claimant complained of midback pain that limited her use of her upper extremities (CX 3, p.18). The therapist recommended "medical evaluation/treatment of midback if not already done" (CX 3, pp.18-9). Dr. Longenecker does not recall if Claimant did, as she testified (Tr. 73), complain of back pain while he was examining her (CX 10, p.23). He does not treat backs and would not have examined it. If she had continued to complain about her back, he would have referred her to another doctor (CX 10, p.23).

Dr. Longenecker took over as Claimant's treating physician at the request of ADD personnel (CX 10, p. 23). He ordered an arthrogram, which was done on January 22, 1999, and the results were unremarkable (CX 10, p.26). He diagnosed Claimant with impingement syndrome or overuse of the rotator cuff, a condition that he believed, within a reasonable degree of medical probability, to be related to her on-the-job accident of July 22, 1998 (CX 10, p.27).

Dr. Longenecker next saw Claimant on March 22, 1999 (CX 10, p. 27). She reported that the pain in her shoulder had improved by about twenty-five percent (25%), but she now had posterior pain (CX 10, p.27). In his notes, Dr. Longenecker observed that she complained of pain "so far posterior I suspect it is coming from the neck" (CX 3, p.7). When Dr. Longenecker examined her neck, he found that it was not symptomatic and that he could not reproduce the pain (CX 10, p. 28). He believed that he could not return her to her previous level of work at that time and that she was not a good candidate for surgery because the chances of success were not high. He thought that she should continue with physical therapy (CX 10, p. 28-9). Dr. Longenecker believed that Claimant genuinely wanted to go back to work for ADD (CX 10, pp.28-9).

Dr. Longenecker saw Claimant again on April 19, 1999, at which time he documented that her shoulder was "popping" during therapy (CX 10, p.30). This indicated to Dr. Longenecker "that whatever was ongoing hadn't smoothed out sufficiently" and that she was not getting better (CX 10, p.31). He saw Claimant again on May 18, 1999, at which time he referred her for an FCE in order to get an independent opinion regarding whether she should return to work (CX 10, p.33).

Upon reviewing the FCE, Dr. Longenecker concluded that it indicated a "fairly high

rating of validity" and that the test accurately represented Claimant's physical capacity (CX 10, p.34). In an August 23, 1999 letter to Dr. Knibbs, Dr. Longenecker placed Claimant at MMI for her shoulder injury retroactive to May 17, 1999. He assigned permanent restrictions of "no overhead lifting or reaching, and with restrictions on push/pull activities as well" (CX 3, p.15; CX 10, pp. 35-6, 55, 129). He assigned an impairment rating of two percent (2%) impairment of the whole person (CX 3, p.15, CX 10, p. 129). Although this letter does not mention lifting restrictions, Dr. Longenecker wrote a letter to Ed Schoenberger of ADD on the same date indicating that the June 9 FCE, which includes lifting restrictions (CX 3, p.12), "should address [Claimant's] work restrictions adequately" (CX 3, 14).

Dr. Longenecker testified that, within a reasonable degree of medical probability , Claimant was not physically capable of returning to her pre-accident job duties, which included "lugging stuff up and down ladders" and overhead reaching (CX 10, pp.37, 55-6). He testified that Claimant could weld if she was doing "piecework" or bench work and did not have to work overhead (CX 10, p.56).

Dr. Longenecker disagreed with Dr. Franco's opinion that Claimant's condition had resolved. Dr. Longenecker testified that her condition was "fairly normal" at the time Dr. Franco examined her because she had not been using the shoulder (EX 18, p.41). If she returned to her previous job "for a week or two, she'd be right back where she was before, and then [Dr. Franco's] exam would change dramatically" (EX 18, p.42).

June 9, 1999 FCE (FCE I) (CX 3, pp. 9-13)

Employer chose the facility that would conduct the FCE (CX 10, pp. 32-3; CX 3, pp. 9-12). The FCE, performed on June 9, 1999, revealed weakness in the right upper extremity. Claimant was able to complete only thirty seconds of sustained overhead reaching, secondary to right shoulder pain, ten seconds of weighted overhead reaching, and fifteen seconds of repetitive overhead reach (CX 10, pp. 33-4; CX 3, p.11). Regarding her back pain, the FCE stated "pain noted with thoracic extension in the mid thoracic vertebra. . .Weakness noted in [right upper extremity] appears directly related to pain in shoulder and thoracic spine. . .Back extensors unsatisfactory limited secondary to pain" (CX 3, p.10).

Regarding Claimant's lifting capabilities, the FCE noted that Claimant was "not tested at the floor to knuckle level as this significantly increased her mid back pain, nor was she tested at waist to shoulder or shoulder to overhead as there was a significant increase in pain with one repetition dynamic lifts" (CX 3, p.11). Under "Physical Demands Level of Worker," Claimant was classified as "light," indicating that she should lift no more than twenty pounds on an occasional basis and ten pounds on a frequent basis (CX 3, p.12). Stooping and bending activities were listed as "restricted" (CX 3, p.12) The FCE had a consistency of 100% and a validity rating of 75% (CX 3, p.11).

Deposition and records of Dr. Robert Franco (EX 1, EX 18)

Employer chose Dr. Robert Franco, an orthopedic surgeon not related to Dr. Edward Franco, to conduct an independent medical evaluation, which took place on August 29, 2000 (EX 1). According to Claimant, Dr. Franco only spent a total of five to seven minutes with her, including the time necessary to take her history and perform a physical examination (Tr. 80). Dr. Franco said that it was difficult to remember how much time he spent with Claimant but that the examination was thorough (EX 18, p.7). He stated that the history in such a case generally takes 15 to 20 minutes, and the actual examination takes 10 to 15 minutes (EX 18, p.7).

Dr. Franco testified that an MRI of Claimant's neck, taken on October 8, 1998, was negative (EX 18, pp. 9-10) Dr. Franco reviewed Dr. Longenecker's records, and he observed that Dr. Longenecker found it difficult to define the cause of Claimant's shoulder pain (EX 18, p.11). Dr. Franco did not see any objective findings to indicate a permanent disability, and he believed that Claimant had resolved rotator cuff tendinitis (EX 18, p.12).

Dr. Franco examined every extremity and joint, taking every joint through a range of motion (EX 18, p.13). He explained the examination process as follows:

> So essentially with the neck we put them through a range of motion, we palpate the areas, we observe and palpate for spasms, and then the upper extremities we check for neurological status by checking reflexes both of the biceps and brachioradialis, check for the pulses, check for sensation, and check for motor strength. . .then we specifically focus on the respective joints. . .[S]ince [the shoulder] was the focus of concern, we palpate the supraspinatus, the biceps tendon, the AC joint, the posterior rotator cuff, the rhomboids, the medial part of the scapular, and the trapezius. . . We then put the patient through a range of motion. . .[and] check for the impingement test and sign by placing the patient through a maximum flexion.

(EX 18, pp. 13-4).

Next, Dr. Franco put Claimant through muscular stress testing for the rotator cuff and examined her neck and back (EX 18, p. 15). On the form Claimant filled out for Dr. Franco, she indicated that she had been injured in the shoulder, back, and neck (EX 18, p.15). Dr. Franco testified that the findings in Claimant's examination were all negative and did not support any objective pathology (EX 18, p. 14). Dr. Franco found no abnormalities with the rotator cuff (EX 18, p.16). The Patrick's test, which determines whether there is any compression on the spinal cord, was negative (EX 18, p.17).

Dr. Franco had examined the records of Dr. Lucie and Dr. Longenecker, and Dr.

Lucie's conclusions were "more compatible with" Dr. Franco's findings (EX 18, p.20). He stated that Dr. Longenecker "took it one step further" than Dr. Lucie and ordered an arthrogram, which was negative (EX 18, pp.20-1). Dr. Longenecker also ordered Biodex testing, which Dr. Franco does not put a lot of faith in because the interpretation varies from therapist to therapist (EX 18, p.22). Dr. Franco does not use the Biodex test in his practice, and he does not know how to read the results (EX 18, p.32). He stated that "the majority of orthopedics certainly don't order Biodex. It's not a standard way of approaching patients" (EX 18, p.39).

Dr. Franco was aware that FCEs were done in this case but did not mention them in his records because he believes that such tests have "very little clinical significance" (EX 18, p.24). Dr. Franco uses FCEs "sparingly" when, in the absence of objective findings, he wants to see if something is "glaringly wrong" (EX 18, p. 23). He uses FCEs in a limited set of circumstances:

> I basically use them to get [patients]. . .back to work when I feel like. . somebody's sitting on a table and has gross symptom magnification and I can't find any findings and. . .I'm stuck. And I basically use that as my last resort to tell them it's time to go back to work.

(EX 18, p.24). Dr. Franco further testified that, if an FCE indicated that a patient had limitations that would prevent them from returning to work, he would "sometimes" send them back to work anyway because he did not accept the results of the FCE (EX 18, p.25). Dr. Franco thought that a majority of orthopedic surgeons used FCEs when dealing with workers' compensation injuries (EX 18, p.42).

Dr. Franco put Claimant through abduction and external rotation, which means that the patient held her arms straight out to the side, then rotated upper extremities so that the palms were facing forward (EX 18, pp.28-9). Claimant was able to complete these motions, as well as internal rotations (palms face up behind the patient and backwards) and flexion (patient holds arms straight out in front of her and over her head) (EX 18, p.29). Generally, Dr. Franco conducts these tests twice with the noninvolved side and four times with the involved side (EX 18, p.30).

Claimant would have to raise her arms more than four times if she were working overhead on the job, but Dr. Franco testified that his examination nevertheless presented a true picture of Claimant's condition (EX 18, p.30). He stated that:

> If she has a pathological change in that shoulder and she has inflammation in that shoulder. . .that exam has to be done only one time to reflect the pathology within the shoulder.

(EX 18, p.31). Dr. Franco stated that if a patient with a chronic rotator cuff problem followed

work restrictions over a period of time, the shoulder would improve (EX 18, p.27). However, Dr. Franco testified that:

> If the patient tells me that. . .they're using their arm in a repetitive fashion and it hurts at the end of the day, generally speaking, it's not that significant a problem if it takes that many repetitions to elicit pain.

(EX 18, p.32). He conceded that there is a potential for someone who feels shoulder pain at the end of the day to end up with chronic problems in the shoulder (EX 18, p.32). Dr. Longenecker commented that Claimant chose to "live with" her shoulder problem rather than to have surgery (EX 18, p.36). Dr. Franco interpreted this to mean that she did not have a significant shoulder problem (EX 18, p.36).

The impingement test that Dr. Franco conducted in his office was "close to" the overhead reach Claimant had difficulty maintaining for ten seconds during the FCE (EX 18, p.35). Dr. Franco did not record the time of the impingement test, and, therefore, he does not know whether she was able to reach overhead for ten seconds (EX 18, p.35).

Dr. Michael Scharf (EX 10)

Claimant visited Dr. Michael Scharf[7] on November 25, 1998. She informed Dr. Scharf that she had experienced pain in her mid and upper back since July 22, 1998, when she was injured at ADD. Dr. Scharf's report of Claimant's medical history stated:

> She started having pain in the right shoulder and the pain went down between her shoulders. Now the pain is in her back. Her shoulder is better. She says that initially she did not feel the back pain because her shoulder was hurting badly. She said that her back seemed to be a dull ache. Now it is more pronounced. . .One year ago, she injured her back while pulling on something. She had pain for a few months. The pain was in the same place. She is currently not working. She says that her shoulder is not totally better. She has had no treatment for her back.

Upon examining Claimant, Dr. Scharf wrote that:

> She moves around easily and does not appear to be in any acute discomfort. In the upright position her spine is straight. The pain is mostly in the paraspinal

[7] Employer's post-hearing brief identifies Dr. Scharf as an orthopedic surgeon. Dr. Scharf's report does not provide any information regarding his credentials (EX 10).

> areas and it is all in the muscles. She has a full [range of motion] of her neck. She has a full [range of motion] of her spine.
> X-rays of her thoracic spine taken in my office are within normal limits.

Dr. Scharf recorded the "impression" that Claimant was experiencing muscular back pain. He concluded:

> I feel that it [Claimant's muscular back pain] needs to work itself out. I feel that she can be working. She can take over the counter medication. She will return as needed. She has no impairment.

Under "work status," Dr. Scharf recommended that Claimant should "return to usual work duty."

Dr. Rogozinski (CX 1, EX 12)[8]

Employer arranged for Claimant to see Dr. Chaim Rogozinski, an orthopedic surgeon who examined her on February 2, 2000. A letter written by Joseph Shaia of ARM Insurance Services ("ARM" or "Carrier") indicated that the purpose of the appointment was "to evaluate [Claimant's] back" (CX 1, p.1).

Dr. Rogozinski reported the results of the examination in a letter to Shaia (CX 1, pp.2-4). He noted that Claimant complained of upper back pain, low back pain, and right leg pain, in order of decreasing intensity (CX 1, p.2). Claimant said that the upper back pain was activity related to and exacerbated by overhead activity. (CX 1, p.2) Examination of Claimant's thoracic and lumbar spine revealed full, but painful, range of motion (CX 1, p.3). Dr. Rogozinski diagnosed Claimant with lumbar sprain/strain; T6-T10 degenerative disc disease; thoracic sprain/strain; somatoform disorder; and morbid obesity (CX 1, p.4). Due to Claimant's weight, Dr. Rogozinski did not believe that she was an appropriate candidate for any kind of surgical work-up. However, if she were to lose a significant amount of weight, then further diagnostic work-up for the lumbar spine would be warranted (CX 1, p.4).

Dr. Rogozinski believed that Claimant's complaints were causally related to the July 22, 1998 injury, and that this injury exacerbated a preexisting condition. He stated that she had reached MMI but that he could not determine at that time if she had sustained a permanent impairment as a result of the July 22 injury. He recommended an FCE to establish Claimant's restrictions (CX 1, p.4).

After reviewing FCE II, discussed below, Dr. Rogozinski reaffirmed his earlier opinion that Claimant's low back and thoracic conditions were causally related to her on the job

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[8] CX 1, pp. 2-4 and EX 12, pp.60-2 contain identical copies of a letter from Dr. Rogozinski to Joseph Shaia.

accident. Dr. Rogozinski further opined that Claimant had sustained a ten percent (10%) permanent impairment rating based on those conditions. He approved the work restrictions set forth in FCE II and concluded that she was incapable of returning to her pre-accident position as a welder (CX 1, p.20).

March 29, 2000 FCE (FCE II) (CX 1, pp. 9-19)

On March 29, 2000, Claimant underwent an FCE at Associated Rehabilitation Clinic (ARC), of which Employer's vocational expert, Jerry Albert, is owner and president (EX 19, p.8). Albert signed and approved the FCE (CX 1, p.19). The results did not indicate symptom magnification (CX 1, p.10). The FCE concluded that Claimant fell in the light material handling (light duty) classification, which restricted her from frequent lifting in excess of ten pounds and occasional lifting in excess of twenty pounds (CX 1, pp. 7,10). The FCE classified Claimant's previous occupation, welder, in the medium material handling category (CX 1, p.12).[9] The FCE also indicated that Claimant should never perform any overhead reaching or lifting and that she should only occasionally stand, squat, bend, reach horizontally, climb stairs, and use tools (CX 1, p.7).

The "history" section of the FCE states: "Currently, Ms. Russell is working as a taxi cab driver. She began this position two weeks ago, working 6 days a week and earning $150.00-200.00 per week" (CX 1, p.11).

Deposition of Jerry Albert (EX 19)

Jerry Albert is the owner of ARC, and he is certified as a rehabilitation counselor and vocational evaluation specialist (EX 19, pp. 8-9). Mr. Shaia of ARM Insurance Services retained Albert and ARC for the instant case on August 20, 1999 (EX 19, p.11). An ARC employee named Rick Robinson conducted a labor market survey (LMS) of the North Florida area (CX 10, pp.11-2, 58-61; CX 10, pp.83-90)[10]. An LMS involves making phone calls to employers in the area in order to obtain information about job availability as well as the hours and physical demands of specific jobs (EX 19, p.13).

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[9] There appears to be an error in the FCE, which states that "the client is physically able to return to this occupation" (CX 1, p.12). This conclusion is inconsistent with information elsewhere in the FCE that Claimant is restricted to light material handling (CX 1, p.10) and that Claimant's previous occupation was in the medium material handling classification (CX 1, p.12; EX 18, pp. 22-4).

[10] The LMS, included among Claimant's trial exhibits at CX 10, pp.83-90, was also offered as Employer's deposition exhibit EX 19-2. Although page number references in this opinion are to CX 10, the documents are identical.

Dr. Longenecker reviewed the survey and approved sixteen jobs (EX 19-2). Based on Claimant's age, education, transferable skills, work experience, and physical restrictions, ARC estimated that she was capable of earning up to $15.53 per hour in the North Florida labor market area (EX 19, p.12)[11]. This estimate took into account the June 9, 1999 FCE that placed Claimant in the light-duty range (EX 19, p.13).

Albert interviewed Claimant on October 1, 1999, and he believed that she was qualified for a number of sedentary jobs. He noted that she has a GED and that unemployment in north Florida is at an all-time low. Claimant is currently enrolled in a vocational training program in North Carolina, and Albert believes that she will be able to complete that training in two years. He noted that she has a car and can drive (EX 19, pp. 16-7). Albert opined that Claimant had an above-average learning potential, and he noted that she had completed skilled training to become a welder (EX 19, p.18). He acknowledged that Claimant would not reasonably be able to work full time while taking her current courseload, but he believed that she could work between zero and twenty hours per week (EX 19, p.34). Albert did not testify as to whether Claimant could have worked when she was in school in Jacksonville (EX 19, p.33).

Albert testified that he had not located any potential part-time jobs for Claimant in the area of her current home in Arden, North Carolina. In fact, he was unaware of where Arden was located (EX 19, pp.27-8). He believed Claimant would be able to do the same type of sedentary jobs identified in the Florida LMS, but he did not do an LMS in North Carolina for those particular jobs (EX 19, p.28).[12]

Albert is not familiar with Claimant's specific duties as a welder with ADD, although he has "been out there [at Atlantic Marine] to look at the job of welder" (EX 19, p.71). He has not measured the amount of lifting that a welder at ADD would be required to do (EX 19, p.73).

As a vocational counselor, Albert relies on the results of FCEs, although he ultimately relies on the opinion of the physician if there is a conflict (EX 19, p.74). Albert approved FCE II, and the physical therapist and biofeedback technician who signed the FCE are Albert's employees (EX 19, pp. 75-6). The FCE results indicate that ARC did not perceive that Claimant was lying about or exaggerating her complaints (EX 19, p.78). The results of this

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[11] Albert refers to an opinion that one of his employees rendered on December 2, 1999 as the basis for the information (EX 19, p.12). I note that this opinion was apparently not included in the record, nor does the record contain any indication of the basis on which this earning capacity was calculated. Albert also cites a December 10, 1999 opinion by a Lisa Hellier, which is similarly absent from the record (EX 19, p.17).

[12] Albert's testified about the availability of job training in Claimant's chosen field and her wage-earning capacity after she completes training (EX 19, pp.30-4) . For reasons discussed in section II. C. below, this testimony is irrelevant.

FCE placed Claimant at a light level, which would prevent her from returning to her previous occupation (EX 19, pp.78-9).

Claimant's Wage Records (EX 4, CX 4)

These exhibits each contain a copy of Claimant's wage records at ADD for the fifty-two weeks prior to July 22, 1998. The records (EX 4 and CX 4), signed by Edward Schoenberg, are identical except that only CX 4 indicates the number of days worked in each week. Both indicate that Claimant earned $14.46 per hour at ADD and that she earned a total of $30,185.50 in the fifty-two weeks preceding her injury. These records provide the basis for the Calculations in section II.D.1. below.

Employer's Exhibit 15 (EX 15)

This exhibit lists benefits that Employer paid to the Claimant. TTD benefits were first paid on October 27, 1998, in the amount of $387.00. On November 8, 1998, Employer paid $663.45. From November 22, 1998 until January 15, 2000, Employer paid $774.00 every two weeks, a compensation rate of $387.00 per week.[13] Beginning on January 29, 2000, Employer reduced the amount of payments to $360.16, a compensation rate of $180.08 per week. Although these payments are listed as "Compensation - Temporary Total" from January 29, 2000 to June 18, 2000 and simply as "Compensation - Temporary" thereafter,[14] it appears that the compensation Claimant received after January 15 should actually be considered temporary partial disability (TPD) compensation.

Employer's Exhibit 16 (EX 16)

This exhibit consists of documents from Claimant's human resources file. The first page indicates that Claimant requested fifty hours of vacation time from July 2, 1998 to July 9, 1998. A handwritten note reads, "Needs vacation check in advance. I forgot to put the advance in early" (EX 16, p.1). The second page, dated May 7, 1997, indicates that Claimant

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[13] This figure is based on Employer's calculation of Claimant's AWW as $580.50.

[14] This amount is apparently based on the conclusion of Employer's vocational experts that Claimant had a wage-earning capacity of $310.40 per week. This calculation appears to be based on a vocational opinion that Claimant was capable of working twenty hours per week while enrolled in school, and of earning $15.54 an hour (EX 19, pp.12,34).

requested full time and overtime hours when applying to ADD (EX 16, p.2).

DISCUSSION

I. Total Disability: Claimant's Prima Facie case

A. Legal Standard

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current law, the employee has the initial burden of proving total disability. To establish a prima facie case of total disability, the claimant must show that she cannot return to her regular or usual employment due to her work-related injury. Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978). Even a minor physical impairment can establish total disability if it prevents the employee from performing her usual employment. Elliot v. C&P Tel. Co., 16 BRBS 89 (1984).

B. Application to Facts

Claimant argues that she is entitled to PTD benefits beginning on April 1, 2000, the date on which she reached MMI for her back injury. Initially, it is clear that Claimant is alleging disability on two separate bases: the shoulder impairment found by Dr. Longenecker (2% whole body impairment rating) and the back injury diagnosed by Dr. Rogozinski (10% whole body impairment rating).[15] Each doctor ordered a separate FCE, on which each relied in setting Claimant's impairment rating. Both doctors agreed that Claimant could not perform overhead work. Both attribute the respective injuries, within a reasonable degree of medical certainty, to Claimant's July 22, 1998 accident.

Claimant testified that her job at ADD required her to lift 50 to 100 pound items on a daily basis, climb straight up and down ladders, perform a significant amount of overhead work, and perform activities that require repetitive bending and crawling (Tr. 51-5). A job description on Employer's letterhead corroborated this testimony (CX 10, p.138). Employer has not disputed the authenticity or accuracy of this description. Either doctor's opinion, if credible, would indicate that Claimant is unable to return to her former employment.

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[15] Although Claimant complains of neck pain, there is no indication that this pain contributes to her disability. Therefore, the neck injury is largely irrelevant to the issue of total disability.

1. Nature and extent of injury to Claimant's right shoulder

The parties have stipulated that Claimant injured her shoulder at work on July 22, 1998. Claimant's August 5, 1998 right shoulder MRI, read by Dr. Edward Franco and Dr. Utz, provides objective evidence that Claimant suffered a tendon problem that could be causing her shoulder pain. However, Employer disputes that Claimant continues to suffer a disability on the basis of this injury. Employer offers the medical opinions of Dr. Lucie and Dr. Robert Franco to support its position. Claimant offers the opinion of Dr. Longenecker that Claimant continues to suffer an impairment to her shoulder and cannot perform any overhead tasks. One Biodex test and two FCEs, which are in evidence, support Dr. Longenecker's diagnosis. I now must weigh the medical evidence in order to determine the nature and extent of Claimant's present disability.

Of the three physicians who examined Claimant's shoulder, Dr. Robert Franco's testimony clearly deserves the least weight. He examined her once, for a maximum of fifteen minutes, and at least some of this time was spent examining Claimant's knee and lower extremities, to which she has never claimed to have suffered an injury (EX 18, pp.17-8).

In contrast, Dr. Lucie saw Claimant at least four times over the two months immediately after her injury, and Dr. Longenecker saw her at least five times over six months (see "Findings of Fact"). At different times, each served as Claimant's treating physician. As such, they had a much more extensive opportunity to observe Claimant over time, which entitles their opinions to greater weight than that of Dr. Franco.

Dr. Franco's report makes no mention of the Biodex test or the two FCEs that Claimant underwent (EX 1). On cross-examination, Dr. Franco admitted that the Biodex test and the FCEs supported a finding that Claimant's complaints were legitimate and that she could not return to her former employment (EX 18, p.26). He testified that the majority of orthopedists do not order Biodex tests, that he personally does not rely on Biodex tests,[16] and that he does not know how to read a Biodex test (EX 18, p.32, 39).

Dr. Franco conceded that a majority of orthopedic surgeons use FCEs in workers' compensation cases (EX 18, p.42). He believes that FCEs have very little clinical significance, and he only uses them in order to tell a patient with "gross symptom magnification" to return to work (EX 18, p.24). He stated that the "overhead reach" test that Claimant failed on the FCE was similar to the impingement test that she passed in Dr.

[16] I note that Dr. Franco did not testify regarding whether the test is generally considered unreliable but simply stated that it is "not a standard way of approaching patients" (EX 18, p.39).

Franco's office. However, Dr. Franco did not time the impingement test that he performed, and he could not testify that the two tests were exactly the same (EX 18, p.35).

Dr. Longenecker disagreed with Dr. Franco's conclusions, stating that Claimant's condition had improved due to following her restrictions but would rapidly deteriorate if she returned to her previous job (EX 18, p.41-2). Dr. Franco conceded that a patient's shoulder could improve over time if she followed restrictions against overhead work (EX 18, p.27). However, he testified that, if she really had a shoulder pathology, it should be detectable in one examination consisting of four repetitions (EX 18, pp.30-1). Dr. Franco stated that a patient who felt pain after multiple repetitions generally did not have a significant problem but that such repetition could cause chronic shoulder problems (EX 18, p.31-2).

Although these statements by Dr. Franco are somewhat contradictory, they allow for the possibility that Claimant could have a chronic shoulder problem that would not manifest itself during a brief examination. Taken together with Dr. Franco's failure to give any weight to the Biodex and FCEs, his brief relationship with the patient, and the fact that his services were apparently retained by Employer in anticipation of litigation, they render Dr. Franco's conclusions less reliable than those of Dr. Longenecker and Dr. Lucie.

Dr. Lucie was the first orthopedic surgeon to whom Employer referred Claimant. At his initial examination on August 24, 1998, Dr. Lucie found "very positive" signs of impingement (EX 17, p.7). In later examinations, however, he found her complaints to be inconsistent. He testified that the inconsistency could be related to a change in the pain from one day to the next, or it could indicate an attempt to fake an injury (EX 17, pp.10-2). After four examinations, he determined that her complaints were too inconsistent to allow him to treat her. He could not find an "objective disease" or "organic site of her problem" (EX 2, EX 17, p.5).

Dr. Lucie did not order an FCE or a Biodex test. He commonly relies on Biodex testing, and he believes that it is commonly used throughout the orthopedic community, although he could not make a statement regarding whether it is generally relied upon (EX 17, pp.26-31). Dr. Lucie testified that the Biodex of Claimant's shoulder appears to indicate that the complaint is valid, although Dr. Lucie added that he is not an expert on shoulder Biodexes (EX 17, p.28).

Dr. Lucie uses FCEs in the normal course of his practice, but the test is based largely on the patient's subjective abilities, and, therefore, presumably, subject to manipulation by the patient (EX 17, p.20). He noted that the FCEs indicated a more limited range of shoulder motion than Claimant had shown when examined by Dr. Lucie or Dr. Longenecker (EX 17, p.24). Dr. Lucie summarized the conflict between his testimony and Dr. Longenecker's as "a difference of opinion . . .which is certainly reasonable for the varied complaints that she gave" (EX 17, p.18).

Employer chose Dr. Longenecker to become Claimant's treating physician (CX 10,

pp.23, 49). He was initially skeptical about the extent of her disability, but he became convinced by the results of her Biodex and FCE that her complaints were legitimate (CX 10, p.19). He also made an objective finding that her shoulder was "popping" as he manipulated it. When Dr. Lucie could not find a physical site of Claimant's ailment, he determined that there was nothing more that he could do. Dr. Longenecker went a step further by ordering a Biodex and an FCE in an attempt to measure the extent and legitimacy of her impairment.[17]

Dr. Longenecker treated Claimant longer than any other physician, ordered more extensive testing, and saw her more recently than Dr. Lucie. Even Dr. Lucie acknowledged that Dr. Longenecker's conclusions were reasonable given the medical evidence. After weighing all relevant evidence, I find Dr. Longenecker's opinion to be the most credible regarding Claimant's shoulder injury. I agree with Dr. Longenecker's conclusion that Claimant has a shoulder impairment which prevents her from working overhead. Because her job at ADD regularly required overhead work, she is totally disabled in the meaning of the act.

2. Nature and extent of Claimant's back and neck injuries

Employer disputes that Claimant suffers any back or neck impairment at all. However, if such impairments exist, Employer argues that they are not related to the July 22 incident.

Employer repeatedly asserts that Claimant did not provide notice of injuries to her back and neck until thirty days before the hearing. The Benefits Review Board ("the Board") has not held that a claimant must file written notice under Section 12(a) each time that she develops an additional medical problem related to the work accident. Alexander v. Ryan-Walsh Stevedoring Co., Inc., 23 BRBS 185 (1990), vacated and remanded mem. on other grounds, 927 F.2d 599 (5th Cir. 1991). However, the record indicates several occasions on which Claimant notified either her doctors or Employer that her back and neck were injured. The LS-302 that Claimant filed on September 22, 1999 states that Claimant's "right shoulder and back" were injured (CX 7, p.2). Dr. Lucie's notes of October 16, 1998 indicate that Claimant complained of neck pain (EX 2), and Employer arranged for two separate physicians, Dr. Scharf and Dr. Rogozinski, to evaluate Claimant's back (EX 10, EX 12). There is no reason to believe that Claimant's asserted back and neck injuries should have come as a surprise to Employer. Employer's repeated arguments that it only had notice of the shoulder-related claims are unjustified, bordering on frivolous.

a. Neck injury

In order to invoke the 20(a) presumption, a claimant must first show that she has

[17] Although the record is unclear regarding whether Biodex and FCE testing are generally relied upon in the medical community, I find it persuasive that Dr. Longenecker and Dr. Lucie, two doctors chosen by the Employer, both stated that they rely on the tests (CX 10, p.19; EX 17, p.26).

suffered an injury. Claimant has complained of neck pain at various points throughout her treatment (EX 17, p.14). X-rays and an MRI of the cervical (neck) area were normal (EX 17, pp.14 -15). Although Dr. Longenecker observed that some of her pain appeared to come from the neck, his examination did not show any symptoms (EX 10, p.28). Dr. Lucie also determined that "the neck appears to be good" (EX 17, p.8). A claimant's credible complaints of subjective symptoms and pain may be sufficient to establish the element of physical harm necessary to invoke the 20(a) presumption. Welch v. Pennzoil Co., 23 BRBS 395 (1990). However, due to the contrary evidence in this case, I find that Claimant has not shown an injury to her neck and, thus, has not invoked the presumption.

b. Back injury

Claimant testified that her back began to hurt within a month of the accident (Tr. 64). Nothing occurred during this period that could explain her back problems except the days of hard work and the July 22 incident (Tr. 64). Although she had injured her back in 1997, the previous pain had gone away altogether, and the new pain was in a different location (Tr. 65).

Two physicians, Dr. Scharf and Dr. Rogozinski, evaluated Claimant's back. In addition, two FCEs address the level of Claimant's back impairment. Dr. Scharf diagnosed Claimant muscular back pain that would be able to "work itself out"(EX 10). Dr. Scharf did not order any additional tests or evaluations. Dr. Rogozinski saw Claimant on February 2, 2000. He determined that she had upper and lower back pain, and that the upper back pain was related to and exacerbated by overhead activity (CX 1, p.2). He diagnosed her back problems as lumbar sprain/strain and T6-T10 degenerative disc disease (CX 1, p.4). He opined within a reasonable degree of medical probability that this ailment was related to her July 22, 1998 injury, and he ordered an FCE (CX 1, p.4). After viewing the FCE, he gave Claimant a ten percent total body impairment rating (CX 1, p.20).

Claimant underwent two FCEs, which are relatively consistent with each other regarding Claimant's back injury (see discussion in "Findings of Fact"). FCE I specifically notes that weakness in the upper extremity is related to pain in the shoulder and thoracic spine (upper back area). This is consistent with Dr. Rogozinski's observation that overhead activity would exacerbate her upper back pain, and together these facts support the inference that the shoulder and back pain are related to the same injury. Both FCE I and FCE II indicate that Claimant should not lift more than twenty pounds occasionally or ten pounds regularly (CX 1, pp. 7, 10; CX 3, p.12). The fact that Employer's own vocational expert approved FCE II renders the FCEs particularly credible (CX 1, p.19).

I find Dr. Rogozinski's opinion to be more credible because Dr. Scharf rendered his opinion without the benefit of the FCEs. No physician other than Dr. Rogozinski rendered an opinion on Claimant's back condition after the FCEs were taken. I also find that Claimant's back complaint was related to her on-the-job accident of July 22, 1998. Dr. Rogozinski opined that they were related, and no physician rendered contradictory testimony. Employer has produced no evidence to sever the causal connection between the accident and

Claimant's back pain.[18]

II. Suitable Alternative Employment and Wage-Earning Capacity

Claimant has made a prima facie case of total disability by showing that she cannot return to her usual employment due to a work-related-injury (see section I above). The burden now shifts to Employer to show the existence of realistic job opportunities which the claimant is capable of performing, considering her age, education, work experience, and physical restrictions. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The employer must establish the precise nature and terms of job opportunities that it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

Claimant argues that she is entitled to PTD benefits beginning on April 1, 2000, which the parties stipulated was the date on which she reached MMI.[19] Claimant moved from the Jacksonville, Florida area to Arden, North Carolina on May 8, 2000 (CX 2, p.14). Therefore, I must examine separately the questions of whether Employer has shown suitable alternative employment from April 1, 2000 to May 7, 2000 and from May 8, 2000 continuing.

A. Suitable Alternative Employment between April 1, 2000 and May 7, 2000

From April 1, 2000 until May 7, 2000, Claimant lived in the Jacksonville, Florida are. There is no dispute that Jacksonville is the relevant labor market during this period. Employer has provided a Labor Market Survey (LMS) that identifies sixteen jobs in the Jacksonville area that Dr. Longenecker approved for Claimant (CX 10, pp. 83-90).

Claimant argues that the LMS is flawed because the jobs were available some time prior to the period in question. The most recent job opening in the LMS was identified on September 30, 1999, and three of the suitable jobs were available, as indicated above, in June 1999 (CX 10, pp.83-90). An LMS conducted before the relevant period is less than ideal. However, given the range of jobs shown by Employer and the nature of Claimant's disability, I find that Employer has made a sufficient showing to allow me to draw the inference

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[18] As a result of this finding, I need not consider the application of the section 20(a) presumption, as Claimant has shown causation without it.

[19] Although it is noted that Employer reduced the level of compensation payments in January 2000, Claimant has not asserted that she is entitled to PTD prior to April 1, 2000.

that suitable employment would have been available to Claimant in Jacksonville in April 2000.[20]

Claimant contends that the LMS lacks credibility because the individual who conducted the LMS did not interview Claimant personally. Claimant cites Siragusay v. Con Agra, Inc., 32 BRBS 781, 789 (1998) and Flowers v. Washington Metropolitan Area Transit Authority, 21 BRBS 203 (ALJ), 208 (1988) in support of this proposition. However, these cases discuss the relative credibility of vocational experts when both the claimant and the employer presented vocational evidence. Claimant has not presented any expert evidence regarding her employability in Jacksonville. Furthermore, Rick Robinson, who conducted the survey, did so as an employee of Jerry Albert, and Albert himself interviewed Claimant (EX 19, p.11-2, 58-61). Although Employer has neglected to submit certain evidence that could be helpful in this case, I find no reason to doubt the credibility of the evidence that was submitted.

Finally, Claimant argues that Employer has not shown that the sixteen jobs fall within Claimant's medical restrictions. In Dr. Longenecker's testimony, he stated that when he approved the jobs in the LMS he was "talking about her shoulder" (CX 10, p.60). It does not appear that Dr. Longenecker considered restrictions based on Claimant's back injury. In fact, he approved the jobs before Dr. Rogozinski rendered his opinion and before FCE II was conducted. In addition to the shoulder restrictions that Dr. Longenecker considered, both FCEs restricted Claimant from lifting more than 20 pounds occasionally or 10 pounds frequently (CX 3, p. 12; CX 1, p.7). FCE I indicated that stooping and bending activities should be "restricted," while FCE II stated that Claimant should only stoop or bend "occasionally" (CX 3, p. 12; CX 1, p.7)

I agree that the Dr. Longenecker's approval of the jobs in the LMS did not account for Claimant's lifting, stooping, and bending restrictions. I also note that the individual who performed the LMS did not testify on the record and that no one testified as to whether the jobs in the LMS were appropriate to Claimant's age, education, work history, and physical abilities. However, I will consider the job descriptions submitted and determine whether Employer has identified jobs that are suitable to Claimant.

The only information about the jobs that Employer identified comes from the brief descriptions in the LMS itself (CX 10, pp. 83-90). The burden of showing that the identified jobs are suitable to Claimant rests on Employer. New Orleans (Gulfwide) Stevedores, supra, 14 BRBS 156. Therefore, if I cannot determine from the limited information provided that a range of jobs are appropriate to Claimant's age, education, work history, and physical abilities, Claimant will prevail on this issue.

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[20] I also note that, although Claimant has only asserted entitlement to PTD beginning in April 2000, Employer evaluated Claimant's suitable alternative employment potential, and reduced compensation accordingly, beginning in January 2000. Therefore, the information on suitable alternative employment was somewhat more up-to-date at the time when Employer used it. Claimant points out that Albert admitted that he could not comment on the Jacksonville labor market in September 2000 (EX 19, pp.62-3), but this is not the relevant period.

Of the sixteen jobs selected by Employer, four indicate a twenty- pound lifting requirement, with no indication of how frequently lifting is required (CX 10, pp.83,86-7). Claimant is restricted to lifting as much as twenty pounds "occasionally" (CX 3, p. 12; CX 1, p.7). Because it is impossible to determine from the job description how frequently lifting will be required, I find that Employer has not shown these job to be appropriate. Similarly, several jobs indicate that stooping and bending will be required "as needed" (CX 10, pp.85,90). Without a more specific description, it is impossible to tell if these jobs will be suitable in light of Claimant's restricted bending status (CX 3, p. 12; CX 1, p.7).

Several other jobs indicate that experience in customer service, computers, or collections is required or "preferred" (CX 10, p.84, 88-9). There is not enough information in the record to indicate whether Claimant is a realistic candidate for these jobs given her experience and background. Although Claimant testified that she took a computer class at some point in the past (Tr. 43), the record is not sufficient to determine whether the skills she learned in that class would be at all relevant to those required or preferred for these positions.

Of the remaining jobs, however, I find that Employer has identified four positions that are clearly suitable considering Claimant's age, educational background, employment experience, and physical restrictions. These jobs, with the wages and the dates they were shown to be available, are:

- weight inspector, state of Florida; $8.38 per hour, plus benefits (9/9/99).
- dispatcher, Yellow Cab; $8.00 per hour (6/14/99).
- customer service representative, Yellow Cab; $7.50 per hour (6/14/99).
- electronic technician, Communications Test Design; $9-10 per hour (6/1/99)

(CX 10, pp.84, 86-7, 89).

Of all the positions listed, I find that the job with Communications Test Design is most appropriate to Claimant's abilities, education, and experience (CX 10, p. 89). The position falls within her physical restrictions. Employees work at a bench repairing cell phones and can stretch as needed. Basic soldering and assembly skills are preferred, and Claimant's extensive experience as a welder qualifies her in this regard (CX 10, p. 89). The LMS indicates a minimum starting wage of $9.00 per hour. Therefore, I find that Claimant had a wage-earning capacity of $9.00 per hour during the period from April 1 to May 7, 2000.[21]

[21] I cannot give any weight to Jerry Albert's testimony that one of his employees rendered an opinion that Claimant had a wage earning capacity of $15.53 per hour in Jacksonville (EX 19, p.12). The LMS discussed in this section does not support such a wage-earning capacity, and Employer has not submitted any other data and reports on which this estimate was based (see note 11, supra). Although the rules of evidence are somewhat relaxed in longshore cases, I cannot credit such totally unsubstantiated hearsay testimony.

B. Claimant's Entitlement to Temporary Total Disability while enrolled in training program (January to May)

Claimant argues that, although Employer has shown suitable alternative employment, she is entitled to TTD benefits from January 1, 2000 and continuing because she is enrolled in a DOL-approved retraining program. Claimant relies on Abbott v. Louisiana Insurance Guaranty Association, 27 BRBS 192 (1993) for the proposition that she is not required to seek employment while undergoing vocational rehabilitation. However, in Kee v. Newport News Shipbuilding and Dry Dock Company, 33 BRBS 221 (2000), the Board made it clear that Abbott placed the burden on the claimant to prove that she is unable to perform suitable alternative employment due to her enrollment in vocational training. Kee, 33 BRBS, at 223. Claimant has not carried that burden as to the time when she was in Jacksonville.

John McGregor, who advised Claimant against working while in school, worked with Claimant only while she was in North Carolina (CX 11, p.14). Claimant testified that the classes she took in North Carolina were "harder" than the Jacksonville classes, which she characterized as "mostly remedial" (Tr. 87). Claimant testified that she took four classes while in Jacksonville but has provided no testimony regarding the actual dates when she was enrolled at FCCJ or the time commitment that her classes required (Tr. 82). Claimant simply has not shown that her training program prevented her from working full time.

In fact, it appears Claimant that actually worked in Jacksonville in the spring of 2000. Claimant testified that she worked at a convenience store and for Gator City Taxi during the time when she was receiving benefits from Employer, although she did not testify about the specific dates (Tr. 40). The March 29, 2000 FCE submitted by Claimant states that, beginning approximately March 15, Claimant was working six days a week and earning between $150.00 and $200.00 per week as a cab driver (CX 1, p.11). It is unclear whether Claimant continued in this job after March 29, but there is no indication that she was prevented from doing so either by her school commitments or by her injury. The Board has upheld an administrative law judge's determination that Abbott did not apply when the claimant actually worked while in school. See Gregory v. Norfolk Shipbuilding and Dry Dock Company, 32 BRBS 264 (1998). Hence, Claimant has not carried her burden to show that she was entitled to total disability benefits while in school in Jacksonville.

C. Suitable Alternative Employment after May 8, 2000

In Wilson v. Crowley Maritime, 30 BRBS 199, 203 (1996), the Board adopted the Fourth Circuit Court of Appeals decision in See v. Washington Metropolitan Area Transit Authority, 36 F.3d 375 (1994). In See, the Fourth Circuit held that where a claimant relocates after being injured, the administrative law judge should determine the relevant labor market by considering such factors as claimant's residence at the time of filing for benefits, the motivation for relocating, the legitimacy of that motivation, the duration of the claimant's stay in the new community, the claimant's ties to the new community, the availability of suitable jobs in that community, and the degree of undue prejudice to the employer in proving suitable alternative employment in the new location. See at 375.

Claimant testified that she moved to North Carolina to Arden, North Carolina on May 8, 2000 in order live with her mother (Tr. 38-40). Claimant is a single mother of two, and she testified that living with her mother helps to alleviate the economic hardships associated with being out of work (Tr. 38-40). Thus, Claimant's credible testimony indicates both that she has natural ties to the Arden area and that she has economic motives for relocating. In fact, Employer has neither questioned the legitimacy of Claimant's motives nor presented any evidence that Claimant's move prejudiced Employer. Although it appears that Employer's expert failed to compile as comprehensive a record as Employer desired in advance of the hearing (Tr. 21-3), there is no indication that such failure is attributable to any action of Claimant.

Employer has made absolutely no showing of suitable alternative employment in North Carolina. The only evidence regarding Claimant's earning capacity and job opportunities in North Carolina addressed jobs that Claimant might be able to obtain after graduating from school and being trained as a medical technician (EX 19, pp. 30-4) . This information is simply irrelevant because the the extent of a claimant's disability must be determined based on the claimant's vocational capabilities at the time of the hearing. Hayes v. P & M Crane Company, 23 BRBS 389, 392, n.4 (1990) (concluding that a claimant's abilities after rehabilitation are purely speculative until she actually completes the program, at which time the proper remedy is section 22 modification). Therefore, I find that Claimant should be deemed permanently totally disabled from May 8, 2000 and continuing. Because Employer has not shown suitable alternative employment in North Carolina, I need not consider whether Abbott applies after Claimant's move.

D. Compensation

1. Average Weekly Wage (AWW)

Claimant alleges that Employer has based its previous compensation payments on an erroneous calculation of AWW. The parties agree that Claimant earned a total of $30,185.80 in the fifty-two (52) weeks preceding her injury (CX 4, p.1, EX 4). Employer has calculated AWW by dividing Claimant's total earnings by fifty-two, to obtain a total of $580.50 (Employer's brief, p.9). Thus, Employer appears to take the position that Claimant's "average annual earnings" are equivalent to her actual earnings during the year prior to her injury.

Section 10(d)(1) of the act states that "the average weekly wages of an employee shall be one fifty-second part of his average annual earnings." Sections 10(a), 10(b), and 10(c) provide three alternative formulas for calculating average annual earnings. Claimant argues that the correct formula is found in section 10(a), which states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker,

> which he shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(a)

Claimant further asserts that she qualifies as a five-day worker under the act. Therefore, she argues, her AWW should be calculated by dividing her total earnings ($30,185.80) by the number of days that she worked (209), yielding an AWW of $722.15.

I cannot accept Claimant's calculation of AWW, because it is based on the erroneous premise that Claimant is a "five-day worker." Analysis of the wage statement on which Claimant relies (CX 4, p.1) reveals that Claimant only worked five days or more during 16 of the 52 weeks in the relevant period: 8 five-day weeks, 5 six-day weeks, and 3 seven-day weeks. Of the remaining 34 weeks, Claimant worked 20 three-day weeks, 14 four-day weeks, one two-day week, and took 1 week of unpaid vacation in which she did not work at all (CX 4, p.1; EX 16, p.1).

Throughout this time, it is clear that Claimant was a full-time worker. In all but one of her three-day weeks, she worked thirty-six or thirty-seven hours. Her four-day weeks all lasted between thirty-eight and forty-eight hours. Her hours during the five-day weeks ranged between forty-seven and fifty-six hours, clearly including overtime hours (CX 4, p.1) . A document in Claimant's personnel file, dated May 7, 1997 indicates that Claimant wanted to work "full time and overtime" (EX 16, p.2). It is evident that this is exactly the arrangement that Claimant received.

Calculation of benefits under section 10(a) is intended as a theoretical approximation of what the employee could ideally be expected to earn, ignoring time lost due to strikes, illness, personal business, or the like. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133 (1990). There is no evidence that Claimant's failure consistently to work a five-day work week resulted from illness, personal business, or any other cause that prevented her from working as much as she may have desired. Rather, it is apparent that Claimant's schedule, whether by her choice or Employer's, was designed to accommodate shifts longer than a standard eight-hour day. Claimant regularly worked a full-time schedule of 36 to 46 hours over the course of a three or four-day work week (CX 4, p.1). It would be wrong to consider Claimant to have been a five-day worker who simply missed a large number of days. Fully two-thirds of her work weeks (34 out of 52) consisted of only three or four days (CX 4, p.1).

Section 10(b) applies only when the claimant has not worked in the employment in which she was working at the time of the injury during substantially the whole of the year. Claimant's wage earning records reveal that she worked during 51 out of the 52 weeks that immediately proceeded her July 22, 1998 injury and that she worked 209 days during this time (CX 4, p.1). Neither party disputes that this schedule constituted working substantially the whole of the year. Therefore, section 10(b) clearly does not apply.

Section 10(c) provides for a situation in which 10(a) and 10(b) "can not reasonably and fairly be applied." In that case, the statute provides:

> such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c)

Because it would clearly be inequitable to treat Claimant as a five or six-day worker under section 10(a) and because section 10(b) does not apply when Claimant worked the entire year, I must use section 10(c) to determine an amount that reasonably represents Claimant's annual earning capacity at the time of her injury. During the fifty-one weeks that she actually worked, Claimant averaged 4.1 days per week (209 days divided by 51 weeks). However, the number of days per week that she actually worked was highly variable. She spent the largest number of weeks (20) working three days but at other times worked between six and seven days (CX 4, p.1).

Due to the irregular nature of Claimant's hours from week to week, it would be misleading to characterize Claimant simply as a four-day worker.[22] The most rational way to calculate Claimant's earning capacity is, in fact, exactly the one Employer has chosen (Employer's brief, p. 9). Employer has looked to Claimant's actual earnings to determine an appropriate AWW, dividing Claimant's total earnings by 52, an approach the Board has approved in other 10(c) cases. Gilliam v. Addison Crane Co., 21 BRBS 91 (1987); Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104 (1989).

I approve Employer's calculation of AWW with one modification. Claimant's week of unpaid vacation (CX 4, p.1, EX 16, p.1) represents time in which Claimant could have worked and earned income. Using my discretion under section 10(c), I find that Claimant's AWW should be calculated based on what her earnings would have been but for this unpaid vacation time.

In Browder v. Dillingham Ship Repair, 24 BRBS 216, aff'd on recon., 25 BRBS 88 (1991), the Board found that when calculating AWW under 10(c), it was within an administrative law judge's discretion to consider what the claimant's actual wages would have been but for seven weeks that she was voluntarily absent from work due to the death of her mother. Id. at 218-9. The Board observed that the death was a non-recurring event and

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[22] In fact, treating Claimant as a four-day worker would yield a slightly lower compensation rate than she has actually received. While there are 208 work days in the year for a four day worker, Claimant actually worked 209 days, and Employer has calculated compensation on this basis (Employer's brief, p. 9).

analogized this case to decisions that considered the wages claimant would have earned in the year preceding the injury but for a personal illness, auto accident or union strike. Id. at 219. See, e.g., Hawthorne v. Director, OWCP, 844 F.2d 318, 21 BRBS 22 (CRT) (6th Cir. 1988); Duncan, supra; Klubniken v. Crescent Wharf & Warehouse Co., 16 BRBS 182 (1984). Although there is not enough information in the record to determine whether the vacation was a "nonrecurring" event, it certainly represents a time in which Claimant could have earned income.[23] Calculating Claimant's AWW based on what she could have earned but for the vacation serves the goal of section 10 to provide a theoretical approximation of what a claimant would be able to earn in a year. See Duncan, supra. Claimant's earning capacity is best calculated by averaging her income in the weeks that she actually worked. I find that Claimant's correct AWW is her income of $30,185 divided by 51, which yields $591.86.

2. Compensation rate

As discussed in section II. A. above, I find that Claimant had a wage-earning capacity of $9.00 per hour between April 1, 2000 and May 7, 2001. Claimant has done nothing to rebut the presumption that she was capable of working a full time forty-hour week during this time. Therefore, her weekly wage-earning capacity was $360.00. The adjusted compensation rate for Claimant's PPD is two-thirds of the difference between her AWW at ADD, $591.86, and her weekly wage-earning capacity of $360.00. Therefore, Claimant's correct weekly compensation rate between April 1, 2000 and May 7, 2000 was:

2/3($591.86-$360.00) = $154.57

Employer has not shown suitable alternative employment subsequent to May 7, 2000. Therefore, the correct compensation rate for that period is the PTD rate, two-thirds of her AWW at the time of the injury, or 2/3($591.86), which yields $394.57 per week.

ORDER

It is hereby ORDERED that:

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[23] In fact, it appears that Claimant expected to be paid for her vacation time. Her human resources file indicates that she requested her "vacation check in advance," but that someone had forgotten to put the advance in earlier (EX 16, p.1). If Employer did pay Claimant for this time, the amount is not included in the wage records that the parties submitted (EX 4, p.2; CX 4, p.1).

1. Employer shall pay Claimant permanent partial disability compensation at a rate of $154.57 per week for the period from April 1, 2000 to May 7, 2000.

2. Employer shall pay Claimant permanent total disability compensation at a rate of $394.57 per week for the period from May 8, 2000 to the present date and continuing.

3. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. Employer shall receive credit for any benefits previously paid to Claimant.

5. Employer shall continue to furnish such reasonable, appropriate, and necessary medical care for Claimant's work-related injury pursuant to section 7 of the act.

6. Within thirty (30) days of receipt of this decision and order, Claimant's attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

_____

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cmp
Newport News, Virginia